

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA,)	
)	
Government,)	Case No. 16-CR-21
)	
vs.)	
)	
SAMY MOHAMMED HAMZEH,)	July 27, 2018
)	
Defendant.)	

TRANSCRIPT OF BOND REVIEW HEARING

BEFORE THE HONORABLE PAMELA PEPPER

UNITED STATES DISTRICT JUDGE

Official Transcriber:
Richard Derrick Ehrlich, RMR, CRR
richard_ehrlich@wied.uscourts.gov
(414) 290-2642

Proceedings recorded by electronic recording.
Transcript produced by computer-aided transcription.

A P P E A R A N C E S

For the Government: Gregory J. Haanstad
Paul L. Kanter
Benjamin P. Taibleson
United States Department of Justice
Office of the U.S. Attorney
517 E. Wisconsin Street
Milwaukee, WI 53202
414.297.1700

For the Defendant: Craig W. Albee
Federal Defender Services of
Wisconsin, Inc.
517 E. Wisconsin Street
Room 182
Milwaukee, WI 53202
414.221.9900

Joseph A. Bugni
Appearing Telephonically
Federal Defender Services of
Wisconsin, Inc.
22 E. Mifflin Street
Suite 1000
Madison, WI 53703
608.260.9900

Samy Mohammed Hamzeh, defendant, present in person.

TRANSCRIPT OF PROCEEDINGS

Transcribed From Audio Recording

* * *

THE COURT: Have a seat everyone, please.

THE CLERK: Case No. 2016-CR-21. *United States of America vs. Samy Hamzeh.*

This matter is before the Court for a bond review hearing.

May we have the appearances, please?

MR. KANTER: Yes. Good afternoon, Your Honor. Paul Kanter, Greg Haanstad, and Ben Taibleson on behalf of the United States.

THE CLERK: Thank you.

PRETRIAL SERVICES: Good afternoon, Your Honor. Hannah Graham with Pretrial Services.

THE COURT: Good afternoon.

MR. ALBEE: Good morning, Your Honor. Mr. Hamzeh appears in person by Craig Albee and Joe Bugni.

THE COURT: Good afternoon.

Good afternoon, Mr. Hamzeh.

As you are all are aware, I noticed this hearing and scheduled it because, under 3164, a provision of the Speedy Trial statutes, the law requires that if the trial for the case doesn't start within 90 days of the time that the defendant begins his time in custody -- so it's a little

1 bit different than the Speedy Trial calculation -- that that
2 person can no longer be detained if the reason that the
3 person was being detained was solely for the purpose of
4 trial, or solely for -- ahead of trial.

5 And I went through, and with the help of my staff,
6 went through and did some calculations, and by my
7 calculations we passed that 90-day period. And the statute
8 requires that once the 90-day period has expired, there is
9 an automatic, quote, unquote, "requirement for review of
10 bond conditions." I say "automatic," quote, unquote,
11 because I'm always a little uncomfortable with the statute
12 that presumes that something is going to automatically
13 happen as if it falls out of the sky or something. But at
14 any rate, I take "automatic" in this case to mean that the
15 Court ought to conduct a review of bond conditions. So
16 that's why I scheduled this hearing.

17 I know the parties will recall that there have
18 been a couple, three bond review hearings in front of
19 Judge Jones, and there was one prior hearing in front of me,
20 I think, back in December. So that is why I scheduled the
21 hearing. So I think I'll start by giving each of the
22 parties an opportunity to address statute and discuss that,
23 and then we will go from there.

24 I will note, by the way, that the Defense filed
25 something just, I think, a short while ago, and I don't know

1 whether the Government had an opportunity to see it, but it
2 was -- it's a brief motion, a couple of pages, and then
3 attached to it is a January 22nd, 2018 letter from Defense
4 counsel to Mr. Kanter and Mr. Haanstad.

5 Have you all had an opportunity to see that?

6 MR. KANTER: No, Judge.

7 THE COURT: Okay. Just share that with you,
8 Mr. Kanter.

9 Oh, okay. Thank you, Mr. Albee.

10 We'll take just a second and let you all take a
11 look at that.

12 MR. KANTER: I think, Judge, it would probably
13 take a little bit more time than just these few moments to
14 completely digest this and answer it, but I can try my best.

15 THE COURT: Well, I guess I'll just note that the
16 letter -- the short motion and the letter are an indication,
17 I think from Defense counsel, that at the hearing that Judge
18 Duffin held a few days ago, that counsel was concerned that
19 maybe there hadn't been as fulsome an explanation about
20 what's been going on with transcripts as counsel would
21 otherwise have provided, and that's a little bit more detail
22 about that. It's related to what we're here to discuss
23 today, albeit not perhaps the direct focus of what we're
24 here to discuss today. So if you need more time to digest
25 it, I'll certainly be happy to give you that, Mr. Kanter,

1 but in the meantime, I guess I'm interested in starting with
2 the 3164 question.

3 MR. KANTER: Well, perhaps if I could, let me
4 begin just by making some general comments about where we
5 are today. I think that's probably what you would like to
6 hear from the Government. And one of the reasons why I'm
7 here today, Judge, is to simply to tell you that the
8 Government failed to deliver. We did. We flat out failed
9 to deliver. We failed to deliver as promised, and we failed
10 to deliver perhaps most -- perhaps of most importance to
11 you, we failed to deliver according to the Court order that
12 was entered. We just failed, and we accept responsibility
13 for that, and I will tell you that I most humbly apologize
14 to you and the Defense for the failure of the Government.

15 With that being said, however, I trust that you
16 know, both from your personal experience with us, not only
17 me but with the United States Attorney's Office and as well
18 by reputation, that this is atypical of the United States
19 Attorney's Office for the Eastern District of Wisconsin.
20 We're embarrassed by that, and we apologize again.

21 You may want just a brief explanation. I'm not
22 going to go into great detail on this, but -- unless you
23 want more explanation, but you might want to know basically
24 what happened here. Why are we in the position that we find
25 ourself in today. And in large part, if not completely,

1 we're in the situation we are today because of the nature of
2 the case. This was new to the U.S. Attorney's Office here.

3 National security cases are very tightly
4 controlled, particularly by the FBI headquarters in
5 Washington, D.C., and the freedom that we normally
6 experience in processing discovery and in dealing with the
7 disclosure of evidence does not exist in cases of this
8 nature. It's quite a different animal, and I learned that,
9 quite frankly, for the first time going through this case.
10 Hopefully the experiences that we've had through this
11 process will guide us in future national security cases, and
12 we won't confront this again, but it was a learning
13 experience. And of particular difficulty, I guess, for lack
14 of a better term in this case, is the fact that we were
15 dealing with recorded conversations which are all in Arabic.
16 There isn't -- I don't want to say that there is absolutely
17 no English on any of those transcripts -- or excuse me -- on
18 any of the recordings, but it is, for all practical
19 purposes, all in Arabic, and that, obviously, presents a
20 multitude of problems, particularly for the FBI.

21 It would be wonderful to be able to tell you that
22 this is the only national security case that the FBI is
23 working on across the country. It would be wonderful to be
24 able to tell you that it's the only national security case
25 involving Arabic that the FBI is working on across the

1 country, but, of course, that is simply not true. The FBI
2 is overtaxed both on the cases and on their ability to
3 handle Arabic translations. That is perhaps in and of
4 itself worthy of criticism. Perhaps the Government should
5 have thought about correcting that situation, but the
6 reality is that they are overtaxed.

7 As a result, quite frankly, I think it's best to
8 simply say that on November -- back in November of last
9 year, when the transcripts were originally delivered, they
10 simply were not in final trial ready form. They were not.
11 And, quite honestly, since then, we have been struggling
12 with the language services division of the FBI in order to
13 address these problems. Both the Milwaukee field office of
14 the FBI and, in turn -- because our information comes
15 through the Milwaukee field office, in turn, the United
16 States Attorney's Office, I can tell you was assured
17 repeatedly more times than I can probably count that the
18 work was being done, that an expert translator had been
19 assigned to the case, and that the transcripts -- translated
20 transcripts would be completed on time.

21 I can only tell you as honestly as I can that the
22 language services division of the FBI failed completely to
23 hit those deadlines. There's no other way to put it. They
24 failed to hit the deadlines.

25 I can tell you based on information that I've been

1 told that last week, the FBI finally admitted and addressed
2 and realized the failure of their language services division
3 and moved immediately to address the problem. This is what
4 they've done. They have reassigned the translation
5 responsibilities to a different team of people.

6 Currently there are three translators that have
7 been detailed to the Milwaukee field office and are
8 currently at the Milwaukee field office working full time
9 and solely on completing these transcripts. They are
10 working on them, actually, as we speak.

11 Just before coming into court, I was informed, we
12 were informed, that there are two additional translators on
13 their way to Milwaukee, one translator and a supervisor
14 translator to continue to work on these transcripts. It is,
15 I think, safe to say now one of the perhaps national
16 priorities of the FBI to accomplish the completion, the
17 trial ready final completion of these transcripts.

18 With that said, again, in all honesty,
19 realistically, whether or not the complete 29 transcripts
20 that are at issue at this time can be completed before trial
21 is still an unknown. I can't tell you that as I sit here
22 right now as to whether or not that's possible. I certainly
23 hesitate, in fact, I won't even speculate as to whether or
24 not it's possible because I feel embarrassed by the fact
25 that the estimates that I personally have provided to this

1 Court in the past have not come true. And I'm embarrassed
2 by that, so I'm not even going to estimate. But I can tell
3 you, and, again, readily admit that, quite frankly, even if
4 we were able to provide those full trial ready 29
5 transcripts, we certainly have failed to do it as previously
6 ordered by the Court. We missed that deadline, and there's
7 no excuse for that.

8 So that brings us, I guess, to today's hearing and
9 the reason why we're here today. And as I see it at least,
10 you're facing a conflict between two relatively simple
11 truths. On the one hand, you have a detained defendant who
12 has not yet received final transcripts, and we're just
13 shy -- or just over three weeks from trial. It's just a
14 reality.

15 And on the other hand, the other truth, I think,
16 is that -- on the other hand is that there has been no
17 change, no factual change in the reasons that this Court and
18 the magistrate court originally ordered detention. The
19 facts and circumstances and the reasons for that pretrial
20 detention still exist. Nothing with regard to that has
21 changed. And, quite frankly, the Government still feels
22 strongly that those reasons compel continued detention in
23 this case.

24 The Government's proposal in order to at least
25 attempt, make as good attempt as we can to keep this trial

1 on schedule, or at least as close to the current schedule as
2 we possibly can, is that the Government would propose to
3 focus on the final preparation of those excerpts of the 29
4 transcripts that the Government intends to introduce at
5 trial.

6 Let me just say that I think -- I hope it's clear
7 to -- for everybody's understanding that the Government
8 identified 29 transcripts, or 29 conversations, if you will,
9 meetings that the Government believes is important to our
10 case and from which our evidence would come.

11 Like in any case, any drug case, for example, we
12 never had any intention of laying forth as an example let us
13 say the entirety of a four-hour conversation. That was
14 never our intention as it never is in any of our cases. But
15 the entirety of those conversations we had taken the burden
16 to prepare because the evidence would come from those
17 transcripts, but it's only excerpts that we would intend and
18 had ever intended to present. So we would propose to focus
19 on that. I can tell you, actually, that that is the
20 instructions that have been given to the translators that
21 are currently working at the FBI field office right now.
22 They are focusing on those excerpts. And we offer, if the
23 Defense is interested, to do the same for them; to take
24 whatever excerpts of the 29 conversations that we previously
25 identified, and we would have our translators focus on

1 preparing their excerpts as well. Again, realistically
2 whether or not we can conclude and complete the entirety of
3 those 29 transcripts, I don't know, and I can't tell you
4 today.

5 Again, just so that there's no confusion, there
6 are many more conversations, I think maybe 100, roughly 100
7 conversations in total that were recorded, and, of course,
8 any of the conversations beyond the 29 that we did at least
9 timely identify, though not in final form, that we did
10 identify according to the Court's order by last November,
11 those are, remain, and always have been the sole
12 responsibility of the Defense. We never took any
13 responsibility for transcriptions beyond the 29 that we
14 identified.

15 So, Judge, I don't know whether or not that
16 answers your question, your concerns. I hope it does, but
17 I'll be happy to answer any questions you might have.

18 THE COURT: Thank you, Mr. Kanter. And I'll
19 obviously turn to Mr. Albee in a moment.

20 I do want to make one remark, though, with regard
21 to what you have said today. In preparation for today's
22 hearing, and, quite frankly, before I even scheduled today's
23 hearing, I went through the minutes, which, as you all know,
24 are on our docket for all the hearings that we've had in
25 this case, and by "we" I mean not just me but the magistrate

1 judges as well since February of 2016, which is when this
2 all started. And I do want to note that there have been a
3 number of hearings at which the Government has made clear,
4 either you or Mr. Haanstad, to the magistrate judges -- and
5 the Defense has not disagreed -- that the issues you just
6 described are not attributable to anything dilatory on
7 behalf of members of the U.S. Attorney's Office here in
8 Milwaukee or even necessarily members of the FBI field
9 office here in Milwaukee. I think the prosecution has
10 stated that several times to the magistrate judges, either
11 Judge Duffin or Judge Jones, and I have not noted anywhere
12 in any of these hearings where either Mr. Albee or Mr. Bugni
13 has intimated otherwise.

14 I appreciate your comments in that regard, but I
15 want to make clear that I didn't schedule this hearing today
16 because I think the U.S. Attorney's Office here has been
17 deliberately dragging its feet. That wasn't the purpose of
18 scheduling the hearing.

19 I appreciate your comments, and I reckon if I were
20 sitting in your chair, I probably would've said some of the
21 same, but that was not why I scheduled today's hearing.

22 Thank you for those comments.

23 I do want to ask one question before I turn to
24 Mr. Albee.

25 You commented, Mr. Kanter, about the factual

1 reasons that Judge Jones and I had stated in previous bond
2 hearings for ordering continued detention and noted that
3 none of that had changed.

4 The reason I scheduled this hearing today,
5 however, was because of the specific provisions in 3164, and
6 3164, I will note, doesn't have as a component a discussion
7 of the reason for the person being detained other than to
8 note that if the detained person is being held in detention
9 solely because he is awaiting trial and has been designated
10 high risk, then 3164 applies. And I think both of those
11 factors apply to Mr. Hamzeh. I think it's pretty clear he's
12 being detained solely because he's awaiting trial. And I
13 know that the Government considers him to be high risk. So
14 all that says to me is that 3164 comes into effect because
15 of those two provisions.

16 It's the second part, 3164(b), that caused me to
17 schedule the hearing today, and that part of the statute
18 doesn't say, you know, Judge, look at why the person is
19 being detained. It says look at how long the person has
20 been detained. So I would appreciate any comments you have
21 as to that part.

22 MR. KANTER: Sure. No, I understand. And I think
23 our understanding of the statute -- the first time I've
24 confronted it. Our understanding of the statute is that it
25 triggers an automatic review. I don't think that

1 necessarily means that release is compelled, at least that's
2 our position.

3 I understand that there might be -- one could read
4 a preference for release, but I don't know that it's compel.
5 And that's why I'm saying that I think that those reasons
6 for detention that were previously identified before the
7 Court still need to be considered because I think that there
8 needs to be a -- I'm suggesting that there needs to be a
9 balance between those very compelling reasons for detention
10 that the Court has already addressed and the delay that the
11 defendant has experienced.

12 THE COURT: Thank you, Mr. Kanter.

13 Mr. Albee.

14 MR. ALBEE: I don't think Mr. Hamzeh's sitting in
15 jail after 30-plus months worrying about which part of the
16 Government is screwing him over, he just know he's being
17 screwed over.

18 It's inexcusable that these transcripts weren't
19 done. We provided the Court with a letter that we sent back
20 in January. We haven't moved forward at all since that
21 letter. Not at all.

22 You know, sometimes you reach these points in
23 proceedings, and the Defense -- there's a suspicion that the
24 Defense is sandbagging, or it's a last-minute effort to
25 postpone the trial, that there's some manipulation or

1 something going on. And, you know, just this letter --
2 could we have been more straightforward about trying to
3 resolve this issue than we are in this letter? It would be
4 impossible.

5 Mr. Bugni spent countless hours going through
6 these transcripts with a fine tooth comb and identifying for
7 the Government what the problems were. And instead of us
8 concealing it, or waiting to attack a translator on the
9 stand and point out all the ways they screwed up, we gave
10 them the information and said, Could you fix this? We want
11 a clean trial that doesn't take six weeks. We want to make
12 this as efficient and streamlined as possible because we're
13 confident in the evidence that we have and what we can
14 present if we can just get that evidence out there through
15 the transcripts that they've indicated that they were going
16 to prepare. And so they gave us the 29 of November.

17 We identified the problems with them. And,
18 you know, our letter concludes in the last paragraph that
19 there has to be some deliberate speed in this endeavor. And
20 then we explained all the things that we have to do once we
21 get the translations because that's kind of the starting
22 point for our preparation rather than an endpoint. And then
23 we talked about how we're only a month out for trial.
24 You know, we got to fix these very problematic ones. We
25 would like to set a definite and short deadline to resolve

1 the transcript problems and move on to other issues, and our
2 hope was, you know, that by February or March we can get
3 these things done and we have more than 90 days because it
4 is very difficult to work through these transcripts, but we
5 have to have our translator go through them. We have to
6 give Mr. Hamzeh an opportunity to at least give a pass on
7 some of these things and tell us whether the speakers are
8 correct, or whether there's something misinterpreted, or
9 whether there's something that he can hear that they don't
10 that's important.

11 It's wonderful that there are now five translators
12 coming into Milwaukee to try to resolve this problem. I
13 don't have five translators on staff. I don't have five
14 people sitting in my office waiting to do this. It's just
15 outrageous.

16 Mr. Kanter talks about things that -- that there
17 haven't been changes. I think our case continues to get
18 better.

19 At the last time we were in front of this Court,
20 we didn't have the actual surveillance documents. On 64
21 occasions, the Government, this overtaxed FBI, had six to
22 eight agents watching Mr. Hamzeh for eight hours at a time.
23 So all that manpower and money that was spent, they observed
24 one incident of road rage and nothing else that was germane
25 to their investigation. Not one thing that they could use

1 that would suggest he had some predisposition to be involved
2 in terrorism or the possession of machine guns.

3 We finally, this winter, got some, not all, texts
4 from the FBI. We believe there are others that should
5 exist. There are some that haven't been preserved that
6 we're still trying to find out about. But one of the texts
7 clearly told one of the informants, "We have to record
8 everything. If you can't get ahold of us to record it, wait
9 a day or two. I mean, the bosses are coming down on us. We
10 have to record everything."

11 Yet for 35 days with near daily meetings with
12 their professional informant and Mr. Hamzeh, there are no
13 recordings, and then all of a sudden this plot exists. So
14 those texts are something we really want, and it's just hard
15 to comprehend why things weren't recorded during that time.
16 And it's -- at the very least, it would appear that there's
17 a rogue confidential informant. That paid professional
18 rogue confidential informant we found out yesterday was
19 charged last month with a felony involving a gun in
20 Milwaukee County. Have they told us? No. Two options:
21 They're not giving us the Brady information timely like
22 they're supposed to, or their informant is concealing stuff
23 on them. Either way it's just another indication that our
24 case is better, and things haven't changed since they
25 were -- we were last here for bail reports.

1 We have filed now expert reports that is ordered
2 by the Court, on the timeline ordered by the Court relevant
3 to Mr. Hamzeh's IQ and how he would be particularly
4 susceptible to inducement.

5 We filed expert reports explaining that the
6 likelihood of any random individual in Milwaukee ever being
7 able to obtain a machine gun, regardless of their financial
8 resources, is being slim to none. And also that the
9 price -- you know, these were supposedly purchased for \$570
10 when these things would cost -- the pair of them would be
11 well over \$10,000, and Mr. Hamzeh had to borrow money,
12 according to the discovery, to buy a \$300 gun. And even
13 then he came up short, but he borrowed some of the 270 that
14 he negotiated, according to the discovery.

15 As I said -- I mean, we weren't lying in the
16 weeds. It's not as though, you know, there was this issue,
17 and we were just waiting to jump on the Government and go,
18 "Gotch you. You didn't do 90 days. You screwed up."

19 This letter shows what kind of degree of effort
20 that we put in to try to resolve these issues because we
21 know it's going to be -- even after we get these things from
22 their five translators, we have one who is, you know, used
23 by other lawyers, too. He's not sitting around waiting.
24 And we know that, you know, once we finally get those, then
25 our process begins of checking the translations, deciding

1 what we want to use. And, again, all along our desire has
2 been to stipulate to something. And we've had many
3 conversations with Mr. Haanstad, and that's his
4 understanding, too. We appreciate that part of it. I mean,
5 it's been a cordial back and forth with the Government and
6 the prosecutors that we want to work this out, and that's
7 been our understanding all along is, yeah, we're adults
8 here, we're not uncivil, and we're going to get this worked
9 out so we can have an efficient trial. And it is the
10 translators, the FBI translators, for whatever reason that
11 haven't produced these things.

12 But we have a United States citizen who has been
13 in custody for a really long time. I don't see any way we
14 can prepare for the trial date that's coming up, yet he, Mr.
15 Hamzeh, absolutely doesn't want an adjournment. You know,
16 it puts us in a position. I have no idea what to do unless
17 he is released.

18 In terms of the 3164, I agree with the Court that
19 we're -- it appears we're well over 90 days in excludable
20 time. One thing I couldn't quite decipher or determine with
21 certainty was whether the pendency of a bail motion is a
22 pretrial motion. It's not so defined, it would appear,
23 under Rule 12. I don't think that bail motions toll with
24 the time. But even if they did, we're well past the 90 days
25 under any circumstance.

1 And Mr. Kanter had some question as to whether
2 release is mandatory, but I think the language of the
3 statute is no detainee, as defined in Subsection A, shall be
4 held in custody pending trial after the expiration of such
5 90-day period required for the commencement of his trial.

6 I mean, to me, that sounds like the release is
7 required under 3164. So we would ask for Mr. Hamzeh's
8 release under Section 3164. We also think it's warranted,
9 as a matter of due process, his presumption of innocence,
10 and that the Court, under the Bail Reform Act, can also
11 consider delay as one of the factors, which, of course, is
12 probably the biggest factor that's changed since the last
13 time we were here is that he'll have been sitting a much
14 longer period of time. And for the due process analysis,
15 the Court considers the length of the delay, which now is
16 pretty extraordinary.

17 Whose fault it is, I think we've pretty much
18 exhausted that issue, and also the weight of the evidence.
19 And, you know, it remains our position that there's a very
20 strong entrapment defense here as well.

21 So those would all support due process, and we
22 think the release under the Fifth, Sixth, Eighth Amendments
23 and to know -- I mean, the Court knows this, I won't go on
24 at length -- but pretrial services has indicated there's a
25 good release plan, in the beginning, the recommended

1 release. He has a place to live. He has a job.

2 The other thing is -- our position is -- my
3 recollection is I think we believe the guidelines are 30 to
4 37 months. Even the Government, I understand, think the
5 guidelines are 70 to 87 months. And with good time at this
6 point, I think he would be about 35 months that he's already
7 served without any determination whether he should serve a
8 single day, which can only be determined at trial.

9 I guess the other thing, just for a host of
10 reasons that I think I've already explained, it would be
11 obvious to the Court trying to prepare for trial, getting
12 these transcripts -- I guess the Government is being
13 straight. They don't even know if we would have them by
14 trial. But we have exhibits and a whole bunch of other
15 things that are due Monday. Exhibits would certainly
16 include these transcripts would be the major, you know, a
17 major thing, and then a lot of exhibits that are taken off
18 the transcripts. So we have that.

19 Oh, the other thing, Judge, is we've provided, I
20 think, seven transcripts apart -- I'm not sure the number,
21 but it's something like seven transcripts of additional
22 conversations that we would like to use at trial that we've
23 given to the Government in advance so that their translators
24 would have a chance to take a pass at those and let us know
25 what they thought the mistakes might be so we could get an

1 agreed transcript for those, too, and that hasn't been done.
2 So it's not just the Government finishing its own
3 transcripts but getting back to us on that. But we've
4 operated with the understanding throughout this period that
5 we would have set transcripts, and that we could work off of
6 those. And Mr. Kanter may be right, they may have prepared
7 a 70-page transcript and choose to focus on 30 pages of it,
8 but we've been always told and had a fair understanding we
9 would get all 70 pages, and we could work from that.

10 Mr. Kanter said the last time we were here for a
11 bail hearing, that he said -- you know, that the context for
12 statements that are made -- he was talking about the
13 post-arrest interview -- are important as opposed to just
14 pulling out words or brief phrases. So we thought the
15 entirety would be important.

16 Again, I'm not trying to put in every word that
17 was ever said between these people but, you know, until we
18 see what excerpts they want, we won't know whether,
19 in fairness, and the Rule of Completeness, we'll say, Hey,
20 you got to add these extra five pages, or whatever it might
21 be in order for the jury to be able to understand that
22 conversation.

23 So, Judge, at this point, we're asking the Court
24 to release Mr. Hamzeh under the conditions proposed by
25 pretrial services and their original report.

1 He does have a job and a place to live. And
2 assuming if the Court did that, then we would be asking to
3 move the trial.

4 THE COURT: Anything further from the Government,
5 Mr. Kanter?

6 MR. KANTER: No, Your Honor. Thank you.

7 THE COURT: Thank you.

8 I've made a response to one comment that
9 Mr. Kanter had made. I'll make a response to one comment
10 that Mr. Albee had made. I think the same record of
11 hearings that I went through (indiscernible) Mr. Albee has
12 indicated, which is the Defense has been clear from day one
13 that it was asking to work through, hopefully, a joint
14 series of transcripts that everyone could utilize, and that
15 that has been made clear at hearings in the past as well.

16 And so I think the way Mr. Albee put it was the
17 Defense has not been lying in the weeds. I think that's
18 absolutely true, and I don't believe the Government has
19 indicated as much either.

20 I will note as a practical matter, quite frankly,
21 that if the parties -- I'm not sure who could question why
22 we wouldn't need a joint set of transcripts. I have no
23 earthly idea how 12 citizens sitting in a jury box, whom I
24 think we can safely anticipate wouldn't speak Arabic, would
25 be expected to make heads or tails out of a trial in which

1 the Government said, "We think that this conversation is
2 saying this," and the Defense said, "We think this
3 conversation is saying that."

4 Even Spanish language transcripts, usually there
5 are a couple folks on the jury who can kind suss out a word
6 here or there.

7 I'm not sure how the trial would even go. And I'm
8 guessing counsel would agree if there weren't a set of
9 transcripts that everyone at least felt comfortable were
10 correct, even if one might disagree about the interpretation
11 of a particular word or a particular phrase or the intent
12 behind a particular word or a particular phrase, I believe
13 that the attorneys sitting in front of me today have always
14 been working very hard -- I know you have. It's not a
15 matter of whether I believe it or not. I know that you have
16 all been working extremely hard on this case from your
17 respective positions.

18 I find it shocking, however -- and perhaps this is
19 what Mr. Kanter was getting at -- that we find ourselves in
20 a position where, after 30 months and change, Mr. Kanter is
21 forced to say that only recently did the Federal Bureau of
22 Investigation wake up and conclude that it was important to
23 provide an accused defendant with constitutional rights of
24 evidence that is required to be provided under the law and
25 rules; that prosecutors should have to beg, wheedle, and

1 cajole to turn over evidence, that the Defense should have
2 to beg, wheedle, and cajole seems to me to fly in the face
3 of everything that the constitution guarantees both charged
4 defendants and our citizens.

5 I understand -- and I know Mr. Kanter is right --
6 that the FBI has many national security cases that they must
7 focus on, and that they have many cases that involve Arabic
8 to English or other languages to English translations that
9 they must focus on.

10 I'll note as an aside that I was not aware, and I
11 don't think I'm incorrect after all these months, I was not
12 aware that Mr. Hamzeh has been charged with national
13 security violations. I believe he's charged with possession
14 of two machine guns and a silencer. I understand that there
15 are allegations, very serious ones, that I addressed at the
16 last bond hearing regarding what intent Mr. Hamzeh may have
17 had in obtaining those weapons, and that's, of course, a
18 question to be settled at trial. But this hasn't been
19 charged, for whatever reason, as a national security case.
20 But even assuming that it has, and even -- that that
21 discredited way the Bureau was treated with regard to its
22 interactions with the Government, but even assuming that it
23 had, people who are charged with national security
24 violations have no fewer constitutional and civil rights
25 than others. And looking at the minutes of the hearings, it

1 is quite clear that the Government has been working to
2 obtain these translations for what, quite frankly now, is
3 years with only recent success -- and I appreciate Mr.
4 Kanter's frankness -- that it remains to be seen how
5 successful this recent effort will be.

6 I should note as an aside that the transcripts, as
7 I understand it, are not the only issue. Judge Duffin has
8 been dealing, for the most part, with the discovery issues,
9 but there are other issues as well, Mr. Albee touched on a
10 few, but the Defense continues to seek other evidence in
11 addition to the transcripts, and those are things that also
12 have taken time.

13 I know that the Government has been working hard
14 to deal with the issues of a security classification on some
15 of these materials, and that that's added a layer of time,
16 and the Government has been frank with that and has tried to
17 move as quickly as possible in filing any motions it needed
18 to under Section 4.

19 But, again, all of that being said, it is
20 staggering to me that the law enforcement agency responsible
21 for investigating this case and asking the U.S. Attorney's
22 Office to return charges, or the grand jury to return
23 charges has only realized 28, 29, 30 months in that maybe it
24 should start to do what the law required it to do from day
25 one. That isn't the system as I understand it. That's not

1 the system that I was proud to represent when I sat in the
2 prosecutor's chair, it's not the system that I was proud to
3 be a part of as a defense attorney, and it's certainly not
4 the system that, as a member of the federal judiciary, I
5 would like to think we operate in.

6 With regard to the reason that I scheduled this
7 hearing today, 18 U.S.C. 3164 says -- and I've recounted a
8 little bit of it already -- that if a person is being
9 detained solely because they're awaiting trial, and the
10 Government designated that person as being a high risk, that
11 trial has to be accorded priority -- a relatively loose
12 phrase, I suppose, but in keeping with the comments that I
13 just made, that the Government has made and that the Defense
14 has made, it's fairly clear that it appears the Bureau has
15 not treated this case as a priority. And by "the Bureau,"
16 I'm not necessarily referring to local agents.

17 The statute says that failure to convince the
18 trial, such a detainee, through no fault of his counsel --
19 and I don't think there's any question these delays are not
20 the fault of defense counsel -- shall result in automatic
21 review of the conditions of release.

22 But Mr. Albee is correct. The next sentence says,
23 "No detainee, as defined in Section A, Subsection A, shall
24 be held in custody pending trial after the expiration of
25 such 90-day period described -- required for the

1 commencement of trial."

2 With regard to the calculation of that 90-day
3 period, I have gone through it three times. I did not find
4 any case law that indicated that a bail motion was not a
5 pretrial motion. There may be some; if there is, I missed
6 it. I did find case law talking about whether one counts
7 the day that the motion is filed and the day that the motion
8 is decided. I think that may be academic given the calendar
9 as it's played out here.

10 I did also find Seventh Circuit case law that says
11 that one does not exclude the time between the day that the
12 magistrate judge issues a report and recommendation and the
13 day that a party may object to that, but that may be
14 academic as well given my calculations.

15 As far as I can tell, the time between the date
16 that Mr. Hamzeh was arrested and indicted and the first
17 excludable time period was 14 days. Mr. Hamzeh was arrested
18 on January 26th, indicted on February 9th, had his first
19 appearance in front of Judge Jones on February 9th, and
20 that's when the excludable time started running. That's
21 2016. And the excludable time ran until -- time continued
22 to be excluded until February 24th at which point in time
23 there were motions filed. So significant chunks of time
24 were excluded, but the clock began running again on
25 June 6th of 2017. It ran until June 22nd of 2017 when

1 the motion for bond was filed, and I believe that that time,
2 between that time and the time that was decided, is
3 excluded. It resumed on October 26th of 2017 once the
4 bond motion was decided. It stopped again on
5 November 22nd of 2017 when another bail motion was filed.
6 It resumed running again December 4th, 2017. It stopped
7 again when a motion for Brady materials was filed
8 January 3rd of 2018. It remained tolled until June 8th
9 of 2018 when I ruled on a motion -- I think it was the last
10 motion at that time that was outstanding -- and ran until a
11 motion for bond June 20th. It began running again
12 June 25th, stopped June 28th. Was stopped until
13 July 6th and ran again until July 11th, and I believe
14 it's been tolled since then because there have been motions
15 pending since July 11th.

16 Under that math -- and I can certainly recount it
17 in more detail if any party wishes me to -- but taking that
18 into account, even in the most conservative estimate, not
19 counting the day the motion was filed or the day a decision
20 was made and maybe even assuming that the Seventh Circuit
21 case, which is a very old one called Thomas wasn't worried
22 about the excludable time between the R & R and the
23 objection, we still have 100 days that have expired since
24 the time that Mr. Hamzeh went into custody that were not
25 excluded.

1 Under those circumstances, 3164 mandates that
2 Mr. Hamzeh can't be detained any further pending his trial.

3 I understand Mr. Kanter's comments. Both
4 Judge Jones and I have expressed grave concerns in
5 particular about the information provided to us by the
6 Government about conversations recorded between Mr. Hamzeh
7 and the informants with regard to the intent to commit what
8 I described at the last bond hearing as a chilling crime at
9 the Masonic Temple down the street.

10 I don't think that those facts have become any
11 less concerning, and I think that was Mr. Kanter's point,
12 that that particular circumstance hasn't changed. The
13 Government's concerns, obviously, have not changed. The
14 Defense argues that the one thing that has changed is the
15 strength of its case. That may be. I don't know. But what
16 has changed is that enough time has now passed that under
17 the statute, as best I can calculate it in good faith,
18 Mr. Hamzeh cannot be detained any longer.

19 In addition, Mr. Albee made reference to those
20 cases, and there are a number of them out there relating to
21 the due process concerns, withholding someone in custody for
22 an extended period of time when that person has not been
23 found guilty of a crime. There are some cases that have
24 found that a shorter period is a year or 14 months in
25 custody can violate due process. I don't think I have to

1 make that determination necessarily given 3164, but I
2 certainly note that 30 months is a period of time that must
3 raise questions in anyone's mind as to whether or not we've
4 crossed a due process line.

5 So for all of those reasons, I am going to order
6 that Mr. Hamzeh be released on conditions. I think it
7 appropriate for the magistrate judge to set those
8 conditions.

9 I do note Ms. Graham's office, Ms. Graham herself,
10 filed an update to the bond study that had been filed awhile
11 back, and I trust that all the parties have had an
12 opportunity to see that. And so I'm going to ask my staff
13 to contact the magistrate judge and see who is available and
14 who's on duty to consider the parties, both sides, positions
15 with regard to the conditions of release, and I expect that
16 someone will be available to take care of that this
17 afternoon.

18 Given that, Mr. Albee indicated that depending on
19 what my decision was with regard to release, that the
20 Defense might be seeking adjournment of the trial.

21 Mr. Albee, I don't know if you want to try to take
22 that up this afternoon or if you would prefer to confer with
23 the Government and/or have some time to consider that before
24 addressing that issue?

25 MR. ALBEE: Judge, I would make that request.

1 It's clear from what the Government said that, at best,
2 there's a hope that these can even be completed by the date
3 of the trial let alone incorporated into the parties'
4 presentations.

5 As I mentioned, there's a lot of stuff due on
6 Monday, and it's a lot of work over the weekend. And a lot
7 of the exhibits, a lot of the preparation, a lot of the
8 decisions in this case turns on the transcripts. That's
9 really the beginning part of the preparation, not the end.

10 There's just no -- I mean, the Government has
11 taken since, you know, eight months, however you want to
12 calculate six, seven, eight months with multiple translators
13 to get to this point. They have five, and they're not sure
14 they can do it in a few weeks. It's obviously going to take
15 our person, who I don't even know what his availability is
16 whenever these come in, more time than that. So I just
17 don't see any option other than to move this trial. We ask
18 to do that. And, frankly, I would ask for a status after
19 the Government knows when this group of translations would
20 be done.

21 THE COURT: Mr. Kanter, first of all, is there an
22 objection to adjourning the trial date?

23 MR. KANTER: No.

24 THE COURT: I will say, if I may, I understand the
25 Defense request, and I will grant it, and I will take the

1 August 20th trial date off given the efforts that the
2 Government counsel here in the room have made to get the
3 transcripts on track. I don't want to lose that momentum.
4 And so given that, I am interested in scheduling a status
5 perhaps sooner rather than later not only to talk about a
6 trial date but also perhaps to talk about a plan, a
7 scheduling plan for trying to keep the efforts of the folks
8 who are now in Milwaukee working on these on track with
9 progress reports to the Court and to the Defense.

10 And so I guess I think issue number one is to set
11 a status date, and I'll inquire to both of you as to when
12 you want to set that. And then giving you a heads-up, issue
13 number two, that I would hope to talk about not only a trial
14 date but also how we can stay on top of this between now and
15 then.

16 MR. ALBEE: Judge, a couple things. I think
17 Judge Duffin has scheduled a hearing August 9th?

18 UNIDENTIFIED SPEAKER: For August 9th on the
19 issue of the translations.

20 THE COURT: Okay.

21 UNIDENTIFIED SPEAKER: 2nd.

22 THE COURT: 2nd?

23 UNIDENTIFIED SPEAKER: August 2nd.

24 THE COURT: Sometime early August.

25 MR. KANTER: If I could, I would ask you not to

1 suspend that date. I would like Judge Duffin's status of
2 the 2nd to remain in place.

3 MR. ALBEE: Can ask for that.

4 MR. KANTER: I think that will be a good incentive
5 to make significant progress on the transcripts. I would
6 like that to stay in place.

7 THE COURT: That's perfectly fine with me. I
8 mean, that's kind of what I was trying to get at. And I'm
9 sorry, I must've missed that. I know he filed an order
10 recently, and I don't think I caught that.

11 MR. ALBEE: That was going to be my request as
12 well. We would ask the Court to order that -- you know, all
13 along we've expected the full transcripts for the 29
14 transcripts, that the full transcripts be prepared, and then
15 we can work off those. So that's the Defense request, those
16 full 29 transcripts be prepared that were given to us in
17 November, and then we'll have a jumping off point for our
18 translator and to decide which portions of the transcript
19 should be admitted. Again, we want to work with the
20 Government to come up with stipulations and to, you know,
21 both on the content, and to the extent we can, on which
22 portions of those translations should come in, but I think
23 we should have the benefit of having the entire translation
24 so for Rule of Completeness purposes in deciding what should
25 come in. That's been our understanding the whole time as to

1 what would happen.

2 THE COURT: Mr. Kanter.

3 MR. KANTER: Now that we have the time, Judge, we
4 have no objection to that.

5 THE COURT: Then I will order that, that the full
6 transcripts be prepared.

7 Let me ask this, though. As I understand it,
8 whatever hearing Judge Duffin has set, it was relating to
9 where we are on those transcripts.

10 MR. KANTER: It's a status. It's not a drop-dead
11 date. It's a status.

12 THE COURT: Okay. Because what I would like to do
13 is to ask from you all when you think we might be in the
14 position -- eventually we will be setting a new trial date,
15 and that's where I think I need to reconnoiter with you all.
16 And so would you like to have that August hearing with Judge
17 Duffin and then perhaps get back in touch with me about when
18 you think would make sense to talk about a trial date?

19 MR. KANTER: Yes.

20 MR. ALBEE: That makes sense.

21 THE COURT: All right. All right. Then I'll keep
22 an eye on the docket once that hearing has taken place.
23 Then we'll circle back with each other and talk about when
24 it would make sense to have a discussion about a new trial
25 date once you all have a better sense of where things are.

1 Mr. Kanter, anything else from the Government?

2 MR. KANTER: There is one last thing, Judge.

3 Mr. Haanstad (indiscernible) my attention the other day when
4 we were working the case. I would like to just ask you to
5 clarify the record, if you would.

6 THE COURT: You're making a huge assumption.

7 MR. KANTER: From -- we had a status conference on
8 March 21st of this year.

9 THE COURT: Yeah.

10 MR. KANTER: And I have a copy of the transcript
11 right here. It's been prepared. It's part of the record.

12 At that time, on March 21st, it's clear from
13 your comments and from the parties' comments in setting the
14 trial date, and, actually, continuing a June trial -- not
15 continuing -- rescheduling a tentative June trial date to
16 August 20th.

17 THE COURT: Right.

18 MR. KANTER: It's clear from reading the
19 transcript that it was your intention to suspend the Speedy
20 Trial Act and make a Speedy Trial Act finding as you did
21 back in January when we had a status conference in January.
22 It was not done in March, and I will just ask you to clarify
23 that that was your intention so that at some future point in
24 time there's no confusion about that.

25 MR. ALBEE: Well, I guess I oppose that at this

1 point. They offer to go back in time. I don't think it was
2 done then, and I think it's much too late, much too late
3 now.

4 MR. KANTER: No, it's not. This is something that
5 you can clarify. Your comments were clear from the record
6 that that was your intent. It was just not stated.

7 THE COURT: Mr. Kanter, is the transcript on the
8 docket?

9 MR. KANTER: It is.

10 THE COURT: Do you know what docket entry?

11 MR. KANTER: Actually, I don't. It's not typed on
12 here, but I think -- it was prepared just recently,
13 actually, in July.

14 THE COURT: Okay. So it would be --

15 MR. KANTER: I can give you my copies of them, if
16 you'd like.

17 THE COURT: You don't have to because I can go
18 look at -- that's why I asked if it was on the docket, let
19 me look at it because I have my minutes, and that's what I
20 reviewed.

21 MR. KANTER: Yes.

22 THE COURT: But the minutes don't reflect that, so
23 I would like to look at the transcript.

24 MR. KANTER: Okay.

25 THE COURT: And then I will -- let me look at the

1 transcript, and then I'll get back to you all. And if
2 there's any further argument, I'll be happy to hear it at
3 that point, but thank you for calling that to my attention.
4 I just want to look at what I said because at this point --

5 MR. KANTER: I understand.

6 THE COURT: If I don't look at it, I don't
7 remember it exactly.

8 MR. KANTER: So just for my clarification, a
9 hearing will be yet this afternoon?

10 THE COURT: I believe.

11 MR. KANTER: In front of one of the magistrates?

12 THE COURT: Yes. Yes. I'm thinking it will
13 probably be Judge Duffin because I thought I heard
14 Judge Jones say that he was out today, but I'm not positive,
15 so let me get back to you all and let you know that.

16 MR. KANTER: All right.

17 THE COURT: Mr. Albee?

18 MR. ALBEE: Yes, Judge. And I'll just put one
19 thing on the record. As the Court went through the
20 calculations of unexcluded time, there was one chunk the
21 Court didn't mention that came to mind, and the Court went
22 kind of fast.

23 THE COURT: I'm sorry.

24 MR. ALBEE: No, that's fine. And, again, our
25 position is that the time for -- while bail motion is

1 pending is not excludable, but Judge Jones had taken that
2 bail motion under advisement, and briefing was certainly
3 done no later than July 26th. And so the statute also
4 provides that matters taken under advisement, there's 30
5 days of excludable time under H1H, delay reasonably
6 attributable to any period not to exceed 30 days during
7 which any proceeding concerning the defendant is actually
8 under advisement by the Court.

9 And so that 30 days would've run approximately
10 August 25th or 26th and gone, and I think that would be
11 excludable time all the way until the motion for bail review
12 in November.

13 THE COURT: I apologize, Mr. Albee, but which
14 bail -- because I think there were two.

15 MR. ALBEE: At least, yeah. So our initial bail
16 motion was June 22nd of 2017.

17 THE COURT: Yes.

18 MR. ALBEE: Okay. And I think the Court stopped
19 the clock when going through that. We would contend
20 otherwise. But even assuming that a motion for bond stops
21 the clock, it looks like there was some post-hearing
22 briefing that concluded around July 26th.

23 THE COURT: Okay.

24 MR. ALBEE: And then the 30 days for Judge Jones
25 to take that under advisement would've expired in August,

1 and then we would've had that big chunk of time that came by
2 after that.

3 THE COURT: Okay. Okay. Yeah, I didn't mention
4 that. You're correct.

5 All right. I'll go back, and I'll look over it
6 again, but I'll look over the notes.

7 MR. ALBEE: It just supported the record that the
8 Court made in addition.

9 THE COURT: Okay.

10 MR. ALBEE: Thank you.

11 THE COURT: All right. Thank you all. Thank you
12 everyone.

13 (Hearing concluded.)
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Richard D. Ehrlich, a Registered Merit Reporter and Certified Realtime Reporter, certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

s/Richard D. Ehrlich September 6, 2018

Richard D. Ehrlich, Official Court Reporter